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No. 93-1512

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE INDEPENDENT CORPORATION
GARY EARLES; BETTY DAVIS; JIM KEATON;
MICHAEL MORAN,

Petitioners,

vs.

STATE OF OHIO, EX REL, JOHN ROSZMANN,
Prosecuting Attorney for
Fayette County, Ohio,

Respondent.

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

I. Is public masturbation and sexual intercourse for the purpose of sexual gratification, done while watching a sexually explicit videotape, to be considered expressive conduct or so intimately related with expressive conduct as to warrant First Amendment protection and thus review under *United States v. O'Brien*?

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Respondent State of Ohio, ex rel. John H. Roszmann respectfully requests this Court to deny the petition for a writ of certiorari seeking review of a decision of the Supreme Court of the State of Ohio.

STATEMENT OF THE CASE

Undercover officers from the Fayette County, Ohio Sheriff's Department and the South Central Ohio Task

Force visited the Petitioner's Videotape Arcade on several occasions from January 1992 through March 1992. Upon entering the facility, the officers encountered a desk where an employee checked membership cards. During their initial visit, the investigators obtained a membership after producing identification, signing a form and paying a one dollar fee. Also located in the entrance area are a change machine and a cashier.

The remainder of the facility's physical layout consists of a game and vending area and an arcade area. The arcade area contains thirty-two viewing booths with doors that closed and latched, similar in construction to a public restroom stall. Each booth is equipped with a bench, a menu of sexually explicit videos, and a coin-activated monitor for viewing the videos. The video monitors operate only if the booth's door is closed and latched.

During their visits to the Arcade, the officers collected used tissues, paper towels and a used condom from the floor of the various booths. Also, an officer used a cotton-tipped swab to collect a sample of a white substance he observed in one of the booths. Forensic testing of the tissues and paper towels revealed the presence of semen and pubic hairs. The condom and the cotton swab also contained traces of semen. In addition, the officers observed what appeared to be dry semen stains on the walls, floors and video monitors of the booths. Use of a blacklight confirmed the presence of these stains.

The officers reported that the area was not particularly clean and that the floors of the booths were "sticky." They also described the presence of employees

referred to as "cleaners" who wore rubber gloves, swept and mopped the floors and collected paper towels and tissues from the booths and adjoining hallway.

The arcade has no retail merchandise available for sale; however, all sexually explicit videos shown in the Arcade are sold in the Lion's Den Adult Bookstore, located in a separate structure adjacent to the Arcade. The Lion's Den Adult Bookstore is not involved in this Petition.

Respondent, John Roszmann, former Fayette County Prosecuting Attorney, filed a nuisance complaint against the owners and operators of the Arcade pursuant to Ohio Revised Code Chapter 3767 on March 13, 1992. The complaint alleged the Arcade to be a public nuisance as "lewdness, assignation or prostitution is conducted, permitted, continued or exists" on the premises. The trial court denied appellants' motions for dismissal and suppression of evidence. Thereafter, the court heard evidence on the state's motions for temporary and permanent injunctions. The court issued a temporary injunction on April 10, 1992 and a permanent injunction on July 15, 1992. The final order enjoins appellants from conducting a nuisance at the Arcade, orders the Arcade closed for one year and requires the sale of all personal property used in conducting the nuisance. To all of this the Petitioners appealed to the Supreme Court from the State of Ohio which denied certiorari on December 29, 1993, as no substantial constitutional question exists therein. From these proceedings the Petitioners apply to this Court for a Writ of Certiorari to the Ohio Supreme Court.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners seek review of issues already decided by this Court. Specifically they ask this Court to review its decision in *Arcara v. Cloud Books, Inc.* to require application of First Amendment scrutiny. Thereby requiring, in theory, the application of the stricter scrutiny of the *O'Brien* four-part test, specifically that of step four the "least restrictive means" test. Petitioners attempt to do so by stating that the arguments of the dissent in *Cloud Books, Inc,* have not been adequately disposed of by the majority opinion. Closer inspection reveals the majority in *Cloud Books, Inc.* disposed of the same argument at footnote three of its opinion, when it stated " . . . the 'nonspeech' conduct subject to a general regulation bears absolutely no connection to any expressive activity." *Id.* at fn 3. Therefore the issuance of a writ is inappropriate in this case.

I.

THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY PETITIONERS.

The Petitioners attempt to say the holding in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), does not presently extend to the factual situation presented here and therefore the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968) must be applied to the facts of this case. Arguably, this would have the effect of requiring the State to impose the least restrictive means available to stop the improper conduct of the patrons in this case instead of the one-year closure sanction that was imposed. This one assumption is central to Petitioners' entire argument, as

to find against it on this point makes its entire argument moot.

The case of *Cloud Book, Inc.* was to decide the issue of whether the First Amendment bars enforcement of a statute authorizing closure of a premises found to be used as a place for prostitution *and* lewdness because the premises are also used as an adult bookstore. *Id.* at 698. The Court concluded " . . . the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which Respondents happen to sell books." *Id* at 707. The "adult bookstore" in that case sold sexually explicit books and magazines *with* booths available for the viewing of sexually explicit movies. Deputy Sheriffs observed conduct on the premises that included masturbation, fondling and fellatio by patrons. They also observed instances of solicitation of prostitution and were themselves solicited on at least four occasions. A complaint was brought seeking closure of the premises under New York states public health law which would allow closure for up to one year. Respondents answered the complaint by denying the allegations and asserting that the closure sought would impermissibly interfere with their First Amendment right to sell books on the premises. The trial court rejected the Respondents' First Amendment claim. The Appellate Division affirmed, but the New York Court of Appeals reversed, finding the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968), was the standard that should have been applied. This Court granted certiorari.

This Court found the four-part test of *O'Brien* was not the standard to apply in *Cloud Books, Inc.* as there was no First Amendment issue to be resolved. The Court

found the Respondents did not even have a semblance of expressive activity in their claim nor were the speech and nonspeech elements combined in the same course of conduct. The Defendant in the prior case of *O'Brien*, had, on the other hand, established that his action in burning his draft card was done to "carry a message," which the Court found to be an important element. If he had not done so the destruction of the draft card would not have been expressive conduct. The Court found there must be expressive activity or "speech" to impose the test or there must be speech and nonspeech elements combined in the same course of conduct to warrant incidental limitations on First Amendment freedoms. In *Cloud Books, Inc.*, the legislation involved was directed at unlawful conduct having nothing to do with books or other expressive activity. The Court, therefore, concluded *O'Brien* had no relevance to a statute directed at imposing sanctions on this non-expressive activity.

Neither did the Court in *Cloud Books, Inc.* find the test in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, to apply to the facts presented. In *Minneapolis Star* a special use tax on publications, assessing the tax on the cost of the ink and paper used in producing the publications was found to single out the press. The Court found that singling out the press for special treatment was a violation of the First Amendment unless the tax was necessary to achieve an overriding governmental interest. The differential tax placed such a burden on the interests protected by the First Amendment that the Court could not countenance such treatment unless the state asserted a counterbalancing interest

of compelling importance that it could not achieve without the tax. Since Minnesota had offered no satisfactory justification the tax was found to violate the First Amendment rights of those taxed. The Court in *Cloud Books, Inc.* found the test in *Minneapolis Star* to be likewise inapplicable to the facts presented and held the First Amendment was not implicated by the enforcement of a public health regulation of general application in which Respondents happen to sell books.

The Court of Appeals for Fayette County, Ohio, found the Petitioners' First Amendment contentions in this case to be similarly without merit. It interpreted least restrictive means scrutiny to apply only to those civil and criminal sanctions where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where the statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*, which is the standard set forth in *Cloud Books, Inc.* at 706-707. The state appellate court found neither justification for "least restrictive means" scrutiny to exist in this case.

Like *Cloud Books, Inc.*, the sexual activity found to have occurred in this case contains no significant element of expression protected under the First Amendment. The Supreme Court of Ohio has held that sexual activity in an adult bookstore does not involve elements of protected speech. *State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals* (1992), 63 Ohio St.3d 354, 588 N.E.2d 116. This is on comport with this Court's decision in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, where the Court underscored the fallacy of seeking to use the First

Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. Here the nonspeech conduct is not even closely combined with the speech element. As was indicated before, the persons engaging in showing the videotapes were not the same persons who were engaging in the sexual activity. Petitioners showed the tapes but their clientele engaged in the sexual activity. The only connection between the tapes and the sexual activity was that the Petitioners permitted the sexual activity to occur. Therefore the *O'Brien* test does not apply to the facts of this case as it only applies to conduct with a significant expressive element.

Likewise the state appellate court found the *Minneapolis Star* test not to apply. Masturbation and sexual intercourse is not so inextricably bound up with or intimately related to the display of adult videotapes and movies that the conduct cannot be regulated separately from the protected speech. Nor does the Ohio Revised Code Chapter 3767 have the inevitable effect of singling out expressive activity, as it forbids "lewdness, assignation, or prostitution", as did the statute in *Cloud Books, Inc.*

The true holding of *Cloud Books, Inc.* as stated by the Court was, "We conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which Respondents happen to sell books." *Arcara v. Cloud Books, Inc.* at 707. Thereby finding the legislation in that case to involve neither the *O'Brien* nor the *Minneapolis Star* standards.

II.

THE PETITIONERS ATTEMPT TO NARROW THE SCOPE OF *CLOUD BOOKS, INC.*

The Petitioners offer three distinctions between their factual pattern and that found in *Cloud Books, Inc.* to support their petition. First, the conduct occurring on the premises was not illegal. Second, the conduct did not occur in public. Third, the conduct was intimately related to expressive conduct which is protected under the First Amendment. The Petitioners attempt to narrow the scope of *Cloud Books, Inc.* in hopes of obtaining a Writ of Certiorari.

First, they say the offensive conduct here was unlike that in *Cloud Books, Inc.* as the acts were not criminal in nature. The Petitioners allege the *Cloud Books, Inc.* decision only applies where there is criminal activity, such as prostitution, which is not present in their case. In *Cloud Books, Inc.* there is no indication the opinion is limited to that narrow of a scope. In fact, the action brought by the District Attorney was a civil action as provided by statute. There is nothing in the record to indicate the individuals involved in the public sexual activity in *Cloud Books, Inc.* were ever arrested or prosecuted for the offenses of soliciting to prostitution, lewdness, public indecency or any other offense according to the factual pattern of the case. Indeed, this was never a prerequisite in the New York statute to the successful enforcement of a nuisance suit, it is simply an alternative method as provided by that statute. The fact that *Cloud Books, Inc.* involved prostitution was only incidentally important to the decision of

the case as the holding above indicates. It was the general application of a public health regulation that was at issue. That public health regulation imposed the same sanctions for lewdness, assignation, or prostitution, all of which were present in the case. *Cloud Books, Inc.* simply does not hold that there must be a prior finding of criminal conduct to bring a successful nuisance suit. It only requires that the conduct must be of a nature as prohibited by the nuisance statute. In the instant case, the action of public masturbation or sexual conduct for sexual gratification was adequately proven by evidence at the hearing on the permanent injunction of the nuisance suit.

Second, the Petitioner claims the sexual acts did not occur in public but in private viewing booths. This completely ignores the finding of the Appellate Court that the conduct here was public sexual activity. From photographs and a videotape of the Arcade, the court found the individual booths resemble public restroom stalls. Neither the partitions separating the booths nor the doors to the booths reach the floors. It was clear to the Appellate Court that the space left open was sufficient for a passerby to at least in part observe the activities of a patron or patrons inside an individual booth. Because partitions between the booths do not reach the floor, a patron in one booth could conceivably at least observe the activities of patrons in adjoining booths. Because the booths in the Arcade and those in public restrooms are structurally similar and both are partitioned spaces within a place accessible to the public, the right to privacy in public restrooms is applicable to this case.

The Appellate Court found there is no expectation of privacy in a public restroom unless 1) the individual has

a subjective expectation of privacy and 2) the expectation must, as an objective matter, be one that society is prepared to recognize as reasonable. The Court stated that an individual cannot reasonably expect privacy when using a public restroom for a purpose other than that which the stall was intended. Likewise, a patron of the Arcade cannot reasonably expect privacy while inside one of the Arcade's booths if they utilize the booth for sexual activity, as most adults employing their senses and experience in combination with what can be observed beneath the booths and partitions could ascertain whether sexual activity was taking place inside one of the booths. Also, society is not prepared to tolerate an expectation of privacy legitimizing sexual activity in a partially enclosed booth within an arcade accessible to the public, especially in light of the public health concerns involved. The sexual activity therefore occurred in an area where no right to privacy existed. Stated another way, the activity was "public" for purposes of the definition of lewdness, that is, public sexual activity that is reprehensible or disgusting in nature.

Third, the Petitioner attempts to say the sexual acts conducted on the premises were inextricably bound, or intimately related, to the expressive conduct, i.e. the playing of the sexually explicit videotapes. Thereby referring to the third footnote of *Cloud books, Inc.* where the majority sets straight the difference between that case and those the dissenting opinion attempts to use to criticize the majority opinion.

The Petitioners attempt to use *Cloud Books, Inc.* to apply a proposition of law that has been refuted by the majority in *Cloud Books, Inc.* In Petitioners brief at page 6

they cite *Cloud Books, Inc.*, at 703-704, to stand for the proposition that *O'Brien* applies to conduct inextricably intertwined with or intimately related to speech. That standard is set forth at footnote three where the majority disposes of it on the same grounds as the Respondent sets forth here, the nonspeech conduct subject to the general regulation bears absolutely no connection to any expressive activity.

The cases cited by Petitioners in support of their position here stand for nothing even remotely close to the facts of this case. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the demonstrators were also the persons who sought to sleep in the public park. In *United States v. Albertini*, 472 U.S. 675 (1985), those barred from the military base were also the protestors. Thereby giving credence to the protestors and demonstrators statement that their prohibited conduct contained an expressive element and requiring analysis of their conduct under the *O'Brien* test. In the instant case, the speech element is being conducted by the Petitioners and the regulated nonspeech element is being conducted by their audience. There is no credible evidence the sexual acts contained any expressive element or were done in the same course of conduct as that of the expressive conduct. Thereby asserting at best the standard required by *Minneapolis Star*, which the Court has stated does not apply either.

The cases, therefore, divide themselves into two groups. One which must pass the four-part test of *O'Brien* and another which must pass the test of *Minneapolis Star*.

But both of these tests apply only if there is an implication of the First Amendment. The Court has stated, however, in its holding in *Cloud Books, Inc.*, the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which Respondents happen to sell books. There is no need to revisit the grounds the Court used to decide *Cloud Books, Inc.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 25, 1994